Dec 20 Mr Bradley
Dec 21. Mr Davis 2.
O.J. - Feb 19 Argued Mr Chandler
Feb 22. Postponed
Feb 26 Reversed Miller

SUPREME COURT OF THE UNITED STATES.

No. ~~340.~~ 237 85

WILLIAM H. CRANDALL, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEVADA.

FILED DECEMBER 27, 1865.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 349.

WILLIAM. H. CRANDALL, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEVADA.

INDEX.

	Original.	Print.
Affidavit of T. G. Smith	1	1
Bond	12	7
Citation in justice's court	3	2
Citation on writ of error	11	6
Certificate	14	8
Judgment	10	5
Petition for habeas corpus	7	4
Proceedings in justice's court	5	3
Writ of habeas corpus	9	5
Writ of error	1	1
Order of court	15	8
Opinion of court	16	8

1 *Writ of error.*

State of Nevada--supreme court.

In the matter of the application of William H. Crandall for a writ of habeas corpus.

WILLIAM H. CRANDALL, pl'ff in error, } ag't
THE STATE OF NEVADA, def't in error. }

UNITED STATES OF AMERICA:

The President of the United States to the judges of the supreme court of the State of Nevada, holden at Carson City, in said State, greeting:

Because that in the record and process, and also in the rendering of judgment, in a suit before you, or some of you, wherein William H. Crandall was an applicant and petitioner to your court for a writ of habeas corpus, to be discharged from an unlawful restraint upon his liberty, a manifest error has intervened, to the great damage of the said Wm. H. Crandall, as in his said petition has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the party aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States on the first Monday of December next, at Washington, being the seat of the national government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Supreme Court, at Washington aforesaid, the 8th day of June, 1865, and of the independence of the United States the ninetieth.

[SEAL.] ALFRED HELM,
Clerk Supreme Court, State of Nevada.

Affidavit of T. G. Smith.

STATE OF NEVADA, *County of Ormsby, ss:*

Timothy G. Smith, being duly sworn, says that he is the sheriff and ex officio tax collector of the county aforesaid. That the Pioneer Stage Company are engaged in the business of transporting passengers for hire from this State to the State of California, in stage coaches. That said company have an office in the city of Carson, county aforesaid, at which they receive the fare of passengers, and at which they place said passengers upon their said stage coaches for transportation as aforesaid. That Wm. H. Crandall is the agent of said stage company at Carson city aforesaid. That for the purpose of collecting the tax due from said company, as provided in section 90 of the act entitled "An act to provide for the support of the govern-

ment of the State of Nevada," approved March 9th, 1865, affiant did, on the first Monday of April last past, call upon said Crandall, agent as aforesaid, and demand of him a statement under oath of the number of passengers conveyed or transported from this State upon the stage coaches aforesaid of said company, for the month next preceding the day of such demand, or so much thereof as said company was liable therefor, and payment to this affiant of the taxes for all passengers booked or conveyed out of this State from the aforesaid office of said company for the time aforesaid. Affiant further says that, although more than three days have elapsed since said demand,
2 said Crandall, agent as aforesaid, has neglected and refused, and still neglects and refuses, to make either the statement or payment as demanded of him as aforesaid.

T. G. SMITH.

Sworn before me this 1st day of May, 1865.

WELL. STEWART, *Justice of the Peace.*

Indorsed: Filed May 1st, 1865.

ALFRED HELM, *Clerk.*

3 *Citation in justice's court.*

STATE OF NEVADA, *County of Ormsby, ss:*

The State of Nevada to Wm. H. Crandall, greeting:

An affidavit having been this day filed in my office by Timothy G. Smith, sheriff and tax collector of the county aforesaid, charging that the Pioneer Stage Company are engaged in the business of transporting passengers for hire from this State to the State of California. That you are the agent of said company, at their office and place of business in the city of Carson, State aforesaid. That on the first Monday of April last past he called upon you and demanded a statement by you, as agent as aforesaid, of the number of passengers conveyed out of this State from the office or place of business aforesaid, for the month next preceding the date of said demand, or so much thereof as said company was liable therefor. And also demanded payment of the taxes due from said company, as provided in the act entitled "An act to provide revenue for the support of the government of the State of Nevada," approved March 9th, 1865, and that for a period of more than three days you have neglected and refused to make said statement or pay said taxes demanded as aforesaid:

You are, therefore, ordered and cited to appear forthwith before me, at my office in the city of Carson aforesaid, and answer under oath concerning the number of passengers conveyed or transported out of this State from said Carson City, for the month preceding the first Monday of April aforesaid.
4

Given under my hand this 1st day of May, 1865.

WELL. STEWART, *Justice of the Peace.*

Indorsed: Filed May 1st, 1865.

ALFRED HELM, *Clerk.*

5 *Proceedings in justice's court.*

Justice court, before Well. Stewart, esq., in the matter of the citation of Wm. G. Crandall.

This matter having come on to be heard before me on this 1st day of May, 1865, and it appearing to the court that T. G. Smith, sheriff and ex officio tax collector of the said county of Ormsby, did, on this day, make and file in this court an affidavit setting forth that the Pioneer Stage Company are engaged in the business of transporting passengers for hire from this State to the State of California, and that said company have an office and place of business in Carson City, said county, from which passengers are so transported. That said Crandall is the agent of said Pioneer Stage Company at said office or place of business. That on the first Monday of April, 1865, said sheriff called upon said Crandall and demanded of him a statement of the number of passengers conveyed out of this State by said Pioneer Stage Company for and during the month next preceding said demand, or for so much thereof as said company was liable, from their office or place of business as aforesaid; and also then and there demanded of said Crandall the payment of the taxes due upon said passengers from said Pioneer Stage Company for the time aforesaid, as provided in the act entitled "An act to provide revenue for the support of the government of the State of Nevada," approved March 9th, 1865. That notwithstanding a period of more than three days has elapsed since the said demand, the said Crandall has neglected and refused, and does yet neglect and refuse, to make either the statement or the payment demanded as aforesaid. And it also ap-

6 pearing that upon filing the affidavit aforesaid the undersigned justice of the peace did issue a citation to the said Crandall, ordering him to appear forthwith before the undersigned and answer under oath concerning the number of passengers conveyed or transported out of this State by said company from the place of business aforesaid, during the period of time aforesaid. And the said Crandall having appeared before the undersigned on this the first day of May, in obedience to the citation aforesaid, and having in open court refused to obey the order of this court requiring him to answer under oath as hereinbefore recited and set forth. It is ordered that said Crandall be deemed in contempt of this court. It is therefore adjudged that the said Crandall be punished for said contempt by imprisonment in the county jail of the county aforesaid for one day, and that the sheriff of said county execute this order.

Witness my hand this 1st day of May, 1865.

WELL. STEWART.

STATE OF NEVADA, *Carson City, Ormsby county:*

I, Well. Stewart, justice of the peace for Carson township, Ormsby co., Nevada, hereby certify that the foregoing is a true copy of my

docket in the matter of the citation of Wm. G. Crandall, and the judgment in contempt therein.

Dated May 1, 1865.

WELL. STEWART, *Justice of the Peace.*

Indorsed: Filed May 1, 1865.

ALFRED HELM, *Clerk.*

7 *Petetion for writ of habeas corpus.*

To the Hon. Jas. F. Lewis, chief justice of the supreme court of the State of Nevada:

William G. Crandall, petitioning, respectfully represents that he is unlawfully restrained of his liberty in the city of Carson, county of Ormsby, and State of Nevada, by Timothy G. Smith, sheriff of said county, who claims to hold your petitioner in custody by virtue of an order made by Well. Stewart, a justice of the peace of the township of Carson City, made on the 1st day of May, 1865, adjudging your petitioner guilty of a contempt, and directing that he be imprisoned in the county jail of the county aforesaid for the term of one day, and that said sheriff execute said order.

Your petitioner further represents that he is advised by his counsel that said imprisonment is allegal, for the following reasons, to wit: That the order upon which your petitioner is imprisoned is based upon and made by virtue of the provisions of sections 90 to 94, inclusive, of the act of the legislature of this State entitled "An act to provide revenue for the support of the State of Nevada," approved March 9th, 1865; which provisions of said act your petitioner is advised by his counsel are void, because in violation of, and repugnant to, that subdivision of section 8 of article one of the Constitution of the United States which provides that the Congress shall have power to regulate commerce with foreign nations and among the several States; and that subdivision of section ten of said article one which provides that no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and also of sec-

8 tion seven of article two of the constitution of this State.

Wherefore your petitioner prays that a writ of habeas corpus be issued, directed to the said Timothy G. Smith, sheriff as aforesaid, commanding him to have the body of your petitioner before your honor at such time and place as you may direct, to do and receive what may be then and there considered concerning your petitioner in the premises.

WM. G. CRANDALL.

Subscribed and sworn to before me this 1st day of May, 1865.

ALFRED HELM,

Clerk Sup. Court, State of Nevada.

STATE OF NEVADA, *ss:*

Having read the foregoing petition, and being fully advised in the premises, it is hereby ordered that the clerk of the supreme court of the State aforesaid, issue a writ of habeas corpus, under the seal of said court, as prayed for in said petition, and make the same returnable forthwith to said court.

Given under my hand, at chambers, at Carson City, this 1st day of May, 1865.

J. F. LEWIS, *C. J.*

Indorsed: Filed May 1st, 1865.

ALFRED HELM, *Clerk.*

Writ of habeas corpus and return.

The State of Nevada to Timothy G. Smith, sheriff of the county of Ormsby, greeting:

You are hereby commanded to have the body of Wm. G. Crandall, by you imprisoned and detained as it is said, together with the time and cause of such imprisonment and detention, before the supreme court of the State aforesaid, in the court-room at the city of Carson aforesaid, forthwith, to do and receive what shall then and there be considered concerning the said Wm. G. Crandall, and have you then and there this writ.

By order of Hon. J. F. Lewis, chief justice of the supreme court of the State of Nevada.

Witness my hand and the seal of said court this 1st day of May, 1865.

[L. S.] ALFRED HELM, *Clerk Sup. C't.*

STATE OF NEVADA, *County of Ormsby, ss:*

I, Timothy G. Smith, sheriff of the county aforesaid, in obedience to the annexed writ, do hereby certify and return that I have the said Wm. G. Crandall, in the said writ named, in my custody, and that I hold him by virtue of an order made by Well. Stewart, esq., a justice of the peace for Carson City township, Ormsby county aforesaid, which is hereto attached and made part of this return.

Given under my hand this 1st day of May, 1865.

T. G. SMITH, *Sheriff, Ormsby County.*

Indorsed: Filed May 1st, 1865.

ALFRED HELM, *Clerk.*

10 *Judgment of the supreme court, April term, A. D.* 1865.

The defendant, Crandall, comes before this court on habeas corpus, demanding that he be discharged from the custody of the sheriff of Ormsby county, Nevada, by whom he alleges he is restrained of his liberty. Petitioner, (defendant.) as the agent of the Pioneer Stage Company at Carson City, was required by the sheriff of Ormsby

county, to make statement of the number of passengers conveyed out of the State by that company in the month of April, A. D. 1865, in accordance with the 91st section of the revenue act of the State of Nevada, of 1865. Upon refusal to comply with the provisions of said section of said act, a citation issued, and upon his refusal to answer before the justice, he was regularly committed for contempt, and he now appears before this court upon habeas corpus demanding his discharge, upon the ground that that portion of the revenue law is unconstitutional and void.

This matter having at a former day been fully argued, was submited and taken under advisement by the court, and now on this day all and singular the law and the premises having been seen, heard, and fully considered, the opinion of the court is delivered by Lewis, C. J., Brosnan, J., and Beatty, J., concurring, to the effect that the law in question (viz: sections 90 and 91 of the revenue law of the State of Nevada) is constitutional, and it appearing that the order of the justice in committing the prisoner for contempt was regular and proper, but that the time having expired during which the petitioner could be held under commitment of the court below, and that no order can be made remanding him to the custody of the sheriff, it is therefore ordered that the prisoner be discharged.

Judgment rendered May 31st, 1865.

11 *Citation on writ of error.*

STATE OF NEVADA, *supreme court:*

In the matter of the application of William H. Crandall for a writ of habeas corpus.

WILLIAM H. CRANDALL, pl'ff in error, } Citation on writ of error.
ag't
THE STATE OF NEVADA, def't in error. }

UNITED STATES OF AMERICA, *ss:*

To the State of Nevada, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Wasbington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nevada, wherein William H. Crandall is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. F. Lewis, chief justice of the supreme court of the State of Nevada, this eighth day of June, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the ninetieth.

J. F. LEWIS,
C. J. Sup. Court of Nevada.

Indorsed: Service accepted June 19th, 1865.

GEO. A. NOURSE,
Attorney General of the State of Nevada.
A. G. BLASDEL,
Governor of Nevada.

12 *Bond.*

Know all men by these presents that we, William H. Crandall, and James H. Latham, and J. A. Ralston, are held and firmly bound unto the State of Nevada, in the sum of two thousand dollars, to be paid to the said State, or its assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated the sixth day of June, A. D. 1865.

Whereas the above-named William H. Crandall has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in a certain proceeding or suit wherein William H. Crandall was a petitioner and applicant for a writ of habeas corpus to be discharged from an unlawful restraint of his liberty by the supreme court of the State of Nevada:

Now, therefore, the condition of this obligation is such that if the above-named William H. Crandall shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WM. H. CRANDALL. [SEAL.]
JAMES H. LATHAM. [SEAL.]
J. A. RALSTON. [SEAL.]

Sealed and delivered in presence of—
WM. H. BARSTOW.

STATE OF NEVADA, *County of Storey:*

James H. Latham and J. A. Ralston, having been each duly sworn, say each for himself that he is one of the sureties to the fore-
13 going bond, and is worth the sum of two thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution, and is a citizen and householder of the State of Nevada.

J. H. LATHAM.
J. A. RALSTON.

Subscribed and sworn to before me this sixth day of June, A. D. 1865.

[L. S.] WM. H. BARSTOW, *Notary Public.*

The sufficiency of the sureties in the above bond is approved.

J. F. LEWIS,
C. J. Sup. Court, Nevada.

Indorsed: Filed June 8th, 1865.

ALFRED HELM, *Clerk.*

14 UNITED STATES OF AMERICA, *State of Nevada, ss:*

I, Alfred Helm, clerk of the supreme court of the State of Nevada, do hereby certify that the foregoing fourteen pages, numbered from one to fourteen (1 to 14) inclusive, contain a full, true, and correct transcript of all the papers, orders, and proceedings on file and of record in my office in the case of ex parte Crandall.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court, at Carson City, this twenty-sixth day of June, A. D. 1865.

ALFRED HELM,
Clerk of the Supreme Court of the State of Nevada.

15 In the supreme court of the State of Nevada.

Ex parte William G. Crandall. It is ordered that the defendant be remanded to the custody of the sheriff of the county of Ormsby, to be held by him and dealt with as provided in the order of Justice Stewart committing him, the said Crandall, to the custody of said sheriff. It is further ordered that the concluding paragraph of the original opinion herein filed, which relates exclusively to the order or judgto be rendered, be, and the same is hereby expunged, and that this order stand in lieu thereof.

Order made and entered May 31st, 1865.

UNITED STATES OF AMERICA, *State of Nevada, ss:*

I, Alfred Helm, clerk of the supreme court of the State of Nevada, do hereby certify that the above and foregoing is a true and complete copy of the order made by the supreme court of the State of Nevada, in the case of William G. Crandall, on the 31st day of May anno Domini one thousand eight hundred and sixty-five, as the same appears of record in the minutes of said supreme court, on page 39.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office at Carson City, this 9th day of November, A. D. 1865.

[SEAL.] ALFRED HELM, *Clerk.*

[Int. rev. stamp, 5 cts.]

[State stamp, 5 cts.]

Filed 3 January, 1866.

16 *Opinion of court.*

Ex parte Crandall. It is provided by the 90th section of the revenue act of 1865, that "there shall be levied and collected a capitation tax of one dollar upon every person leaving this State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire, and every person, firm, corporation, or company owning or possessing, or having the care or management of any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire, shall pay in the manner as herein provided to the sheriff as ex officio license

collector of the several counties within this State, the said tax of one dollar for each and every person so conveyed or transported from this State.

Section 91 declares that "for the purpose of collecting said tax every such person, firm, corporation, or company, their agent or agents, shall make a statement under oath to the sheriff or other officer rized to collect said tax, of the number of passengers so conveyed or transported from the State by any railroad, stage
17 coach, or other vehicle owned by him or them, under his or their control or charge, on the first Monday of each month, for the preceding month, and shall pay over to the sheriff or other officer the capitation tax, as provided in this act, for each passenger so conveyed or transported, which tax shall be paid in the county from which such passengers shall be conveyed or transported."

For the purpose of enforcing the observance of these provisions of the law it is made the duty of all justices of the peace to whom complaint may be made to issue a citation ordering any party or parties refusing to make the statement required by section 91 to appear forthwith before the justice issuing such citation, and answer upon oath concerning the number of passengers conveyed or transported out of the State from that point or place for the preceding month. And such justices are also authorized, in case of refusal so to answer, to commit such person or persons for contempt.

The petitioner, being the agent of the Pioneer Stage Company at Carson City, was required by the sheriff of Ormsby county to
18 make statement of the number of passengers conveyed out of the State by that company in the month of April, A. D. 1865. Having refused, the proper proceedings were had, a citation issued, and upon his refusal to answer before the justice he was regularly committed for contempt, and he now appears before this court upon habeas corpus demanding his discharge upon the ground that that portion of the revenue law levying this tax is unconstitutional and void. All other questions being expressly waived by counsel, the constitutionality of the law alone will receive our consideration.

Questions as to the relative powers of the general government and the several States have, from the foundation of the Union, been as divisions; and no feature in the history of those controversies is prolific in forensic discussions and judicial investigation as in political more prominent than the open reluctance which the State courts have ever manifested in deciding against the authority of the States. Whilst in many cases perhaps political sentiments may have given color to their decisions, yet it must be acknowledged that there
19 are weighty reasons in support of the general policy which they have pursued upon such occasions.

A proper respect for the opinions of those composing the coordinate branches of the government is often in itself sufficient to outweigh a doubtful opinion entertained by the court. The fact also that no appeal can be taken from the decision of the highest court of a State in questions of this character, where its decision is against the authority of the State and in favor of the general government,

is certainly no insignificant consideration; neither should the necessities of the State, the nature of the authority exercised, nor the object sought to be attained be overlooked. If the authority exercised or the laws enacted be dictated by a wise policy or an imperious necessity, and the welfare or safety of her people is promoted thereby, the court which would be reluctant in depriving her of the one or annulling the other, should need no apology.

Nor have the considerations favoring a liberal construction of federal powers much weight in cases of this kind; for it is obvious to all that the powers of the general government are not necessarily augmented by derogating the authority of the States. They may
20 be deprived of powers by their own courts upon the plea of repugnancy to some authority of the general government, which authority that government may never recognize in itself, or if recognized, never exercise; thus paralyzing the powers of the States and depriving them of sovereign and indispensable authority without conferring the shadow of power upon the general government, and producing the unhappy result of a State without the power and a Congress without the disposition to legislate upon subjects of vital importance to the people. Whilst we believe the supremacy of all constitutional laws and regulations of the general government should be cheerfully recognized, and the decisions of its Supreme Court determining its authority accepted as final and controlling, care should be exercised that those powers essential to the welfare and prosperity of the State should not be unnecessarily relinquished.

No power perhaps is more essential to secure the great end of government than a full and unrestricted power of taxation; and as a total deprivation of that power would result in inevitable and
21 hopeless ruin, so every restriction upon, or derogation from it, proportionately diminishes the power of the State to maintain itself. And as the power and prosperity of the States directly enhances the glory and augments the power of the general government, so weakness and poverty must necessarily produce the opposite results. All considerations then outside of the immediate questions in this case are certainly in favor of sustaining the law of this State.

The first point made in the argument of this case is, that the law imposing the capitation tax of one dollar upon passengers leaving the State is in conflict with the power of Congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and also that it is repugnant to that provision which declares that "no State shall without the consent of the Congress lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

It is not claimed that the revenue act conflicts with any law of Congress passed under its authority to regulate commerce, but it is insisted that that power is exclusive in Congress, and any ex-
22 ercise of it by a State is repugnant to its authority over the same subject.

Waiving for the present the question of whether the Constitution vests all power of legislation upon the subject exclusively in Con-

gress, we will direct our inquiries to the question of whether this act of the legislature can be considered a regulation of commerce. We think not. Though it may perhaps incidentally or indirectly affect commerce between the States, it is evident the legislature had no intention of legislating for the regulation of commerce, or of interfering with the power of Congress to do so; but in the exercise of a power unquestionably vested in it, a burden is perhaps placed upon the commerce among the States. Can it, however, be said that every act of a State legislature which remotely or incidentally affects commerce between the States is unconstitutional? If so, every act which a State might adopt imposing taxes upon its citizens or the property within its jurisdiction must be unconstitutional, for no tax can be imposed upon property which will not in some way affect commerce not only between the States, but also with foreign countries. All
23 taxes upon imported goods must in some degree affect their importation, and yet that a State may tax such goods (after they have left the possession of the importer) to an extent which would even result in a total prohibition of their importation, there is no doubt. So a State may require a license to sell goods imported from another State, and may prohibit all sales except by those having a license. License Cases, 5 How., 573. And yet the direct effect of such a regulation would be to decrease the importation of such articles; but as said by Mr. Justice McLean, in the cases above cited, "still it is clear that a law of a State is not rendered unconstitutional by an incidental reduction of importation."

And indeed it seems to be well settled, upon the weightiest authority, that there is no restriction upon the taxing power of the State, except the laying of imposts, or duties on imports and exports; and if, in the exercise of this power, foreign commerce or commerce among the States be incidentally affected it cannot be said to be a regulation of it, and the State authority must be maintained.

This is the doctrine maintained by many of the framers of the federal Constitution and by many of its most able expounders.
24 Mr. Hamilton in the thirty-second number of the Federalist says, "I am willing here to allow in its full extent the justness of the reasoning which requires that the individual States shall possess an independent and uncontrollable authority to raise their own revenue, for the supply of their own wants. And making this concession, I affirm (with the exception of duties on imports and exports) they would under the plan of the convention retain that authority in the most absolute and unqualified sense."

And in the case of McCullough *vs.* The State of Maryland, 4 Wheat., 428, Chief Justice Marshall says: "It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself." The very prohibition that no State shall lay any impost or duty on imports or exports is itself a strong implication that as to

all other taxes the authority of the State remains unrestricted. Chief Justice Taney, in his dissenting opinion in the passengers cases, says: "I may, therefore, safely assume that according to the true construction of the Constitution, the power granted Congress to
25 regulate commerce did not in any degree abridge the power of taxation in the States. * * * They are expressly prohibited from laying any duty on imports or exports, except what may be absolutely necessary for executing their inspection laws, and also from laying any tonnage duty. So far their taxing power over commerce is restrained, but no further." And in the case of Livingston *vs.* Van Ingen, Chancellor Kent makes use of the strong language that "the States retain the same absolute powers of taxation which they possessed before the adoption of the Constitution, except the power of laying an impost, which is expressly taken away. This very exception proves that without it the States would have retained the power of laying an impost, and it further implies that in cases not excepted the authority of the States remains unimpaired." If, then, the passengers conveyed out of the State be not comprehended within the term "export," (as they certainly are not,) the levying of the tax upon them while within the jurisdiction of the State is the legitimate exercise of a power which the State unquestionably possessed.

But it is said if the State has the power to levy this tax, it may be so exercised as to prohibit all emigration from the State. True, but that would be an abuse of power, and it is illogical to argue
26 from its abuse against its existence. So a State might impose taxes so burdensome upon imported goods as to prohibit their importation; it is nevertheless settled beyond a doubt that it may do so.

If, however, it is admitted that the act of the legislature is a regulation of commerce, it is a complete answer to the position of counsel for the petitioner that the State law does not conflict with any act or regulation of Congress, and the power to regulate commerce being concurrent in the States and the general government, the State may pass any law regulating it within its jurisdiction not conflicting with some law of Congress. The concurrent power of the State, however subordinate to that of the general government, its laws must yield whenever they conflict with any act of Congress regulating the subject. We are aware that a great diversity of opinion has existed and still exists upon this perplexing question, and that some of the ablest judges who have graced the jurisprudence of our country have entertained opposite opinions upon it; and though it has often engaged the attention of the courts, it cannot be said to be free from doubt and uncertainty. The weight of authority and force of
27 reasoning, however, certainly seem to be in favor of the doctrine that the power is exclusive in Congress only so far as it is exercised by it; that a State law is not unconstitutional because repugnant to the dormant power in Congress to regulate commerce.

The mere grant of power to Congress cannot, by any reasonable construction, imply a prohibition upon the States. If so, why are

many of the same powers expressly prohibited in the same instrument? Indeed, nothing seems more evident than that the framers of the Constitution did not so intend it. If they did, they may be charged with having introduced numerous useless and objectless provisions into it, which is an assumption not to be tolerated. It is apparent from the whole tenor of the Constitution that the object was to vest some powers exclusively in the general government, and to leave others to be concurrently exercised by it and the several States. The power is granted to the federal government "to grant letters of marque and reprisal," "to coin money," and "to make treaties," and yet by section ten, article 1 of the Constitution these same powers are expressly prohibited to the States. If the grant of such powers implied a prohibition upon the States, why this express prohibition of some of them? True, there are powers granted which from their
28 very nature become exclusive. Any power growing out of the federal Union and not possessed by the States before the adoption of the Constitution are necessarily exclusive: as, for instance, Congress has power to borrow money on the credit of the United States, to constitute tribunals inferior to the Supreme Court, and to make rules for the government of the land and naval forces.

These are powers resulting directly from the Union of the States, and cannot be exercised by any one of them. But where the authority is one vested in the States before the adoption of the Constitution, and it is not directly repugnant to or incompatible with a similar power granted to Congress, it is not exclusive, and may be exercised concurrently by both governments, unless the granted power be in express terms made exclusive, or its exercise is prohibited to the States.

And with the qualification always that when the laws of a State and of Congress conflict, or the State law is repugnant to any law of the general gouernment, that of Congress being the supreme law of the land, must prevail.

There are many powers granted to Congress the exercise of which is indispensable to the safety and welfare of the States, and which have never been exercised by Congress. The power to establish uniform laws on the subject of bankruptcy throughout the
29 United States; to fix the standard of weights and measures; to provide for organizing, arming, and disciplining the militia, are granted to Congress, and yet the right of the States to exercise the same power has been always recognized and never seriously questioned. In the case of Houston *vs.* Moore. 5 Wheat., 1, the Supreme Court of the United States held that the grant of power to the federal government to provide for organizing, arming, and disciplining the militia did not preclude the States from legislating on the same subject, provided the law of the State is not repugnant to the law of Congress.

So, too, in the case of Sturges *vs.* Crowinshield, 4 Wheat., 196, it was held by the same court that a State might legislate upon the subject of bankruptcy, notwithstanding that power is granted to Congress to pass uniform laws on the subject. It would be rather diffi-

cult, we apprehend, to give any substantial reason why these powers should be concurrent, and the power to regulate commerce exclusive. There is nothing in the form of a grant, and certainly there seems to be nothing in the character of the powers, which would authorize a rule in the one case not applicable to the other. If not, these cases directly sustain our views upon this question. In the early history of the Constitution, this was the prevailing doctrine among the ablest advocates for its adoption.

30 In the 32d number of the Federalist it is said that "notwithstanding the affirmative grants of general authorities, there has been the most pointed case in those cases where it was deemed improper that the like authorities should exist in the States, to insert negative clauses, prohibiting the exercise of them by the States."

In the same number Mr. Hamilton says that there are only three cases in which the State authority is alienated. 1st. Where the grant to the general government is in express terms exclusive. 2d. Where the power is expressly prohibited to the States; and 3d. Where an authority in the States would be absolutely and totally contradictory and repugnant to one granted to the Union.

In the case of Livingston *vs.* Van Ingen, 9 John. R., 507, Chancellor Kent, in delivering the opinion of the court, says: "The powers of the two governments are each supreme within their respective constitutional spheres. They may each operate with full effect upon different subjects, or they may, as in the case of taxation, operate upon different parts of the same subject. * * * We have nothing to do, in the ordinary course of legislation, with
31 the possible contingency of a collision, nor are we to embarrass ourselves in the anticipation of theoretical difficulties, than which nothing could in general be more fallacious. * * * One safe rule of construction and of action is this, that if any given power was originally vested in this State, if it has not been exclusively ceded to Congress, or if the exercise of it has not been prohibited to the States, we may then go on in the exercise of the power until it comes practically in collision with the actual exercise of some congressional power."

Mr. Justice Thompson, in the same case, says: "But it is obvious that the mere grant of a power to Congress does not necessarily vest it exclusively in that body." So this construction has been respectively recognized by many of the judges of the Supreme Court of the United States, and the court itself, in the case of Wilson *vs.* The Blackbird Creek Marsh Co., 2 Pet., 245, expressly declared this to be the correct doctrine, even in the case of the commercial power. We would feel satisfied to rest this question upon the authority of that case, were it not for the fact that some of the judges of the same court have subsequently attempted to repudiate the rule there adopted.

32 That case arose upon a privilege granted by the legislature of Delaware to the plaintiff to construct a dam across a navigable creek, through which the tide ebbed and flowed. The question was directly raised as to whether the act of Delaware was in

conflict with the power of the United States to regulate commerce, and the court expressly passed upon it.

In delivering the opinion, Chief Justice Marshall said: "If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States, we should feel not much difficulty in saying that a State law coming in conflict with such an act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely in its repugnancy to the power to regulate commerce with foreign nations, and among the several States, a power which has not been so exercised as to affect the question.

The act is not in violation of this power in its dormant State."

33 The question again came up before that court in the license cases, 5 Howard, 514, and the doctrine is reiterated and sustained by a power of reasoning which ought to have settled the question in that court at least; but in subseqent cases which have been before it, a different rule is laid down by some of the judges, and it is claimed that it has been established by the court.

In Thurlow *vs.* The Commonwealth of Mass., Mr. Justice McLean says: "The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health and morals of a city may be removed. Merchandise from a part where a contagious disease prevails, being liable to communicate the disease, may be excluded, and in extreme cases it may be thrown into the sea. This comes in direct conflict with the regulation of commerce, and yet no one doubts the local power. It is a power essential to self preservation, and exists necessarily in every organized community." Mr. Justice Catron in the same case says: "That the law of New Hampshire was a regulation of commerce among the States in regard to the article for the

34 selling of which the defendants were indicted and convicted, but that the State law was constitutionally passed, because of the power of a State thus to regulate, there being no regulation of Congress, special or general, in existence to which the State law was repugnant."

This was declared to be the rule by the entire court, and sustained by the opinion of six of the judges. The question was necessarily involved in those cases and determined by the court. This is certainly an array of authorities which no court should disregard, except upon the most pressing necessity, and upon counter authority equally binding. It is claimed, however, that the Supreme Court, in the cases of Gibbons *vs.* Ogden, 9 Wheat., 1; Brown *vs.* The State of Maryland, 12 Wheat., 392, and the Passenger Cases, 7 How., 392, settle the question in favor of the exclusiveness of the power. We think not. The case of Gibbons *vs.* Ogden did not involve the question. That case arose upon an act of the legislature of New York granting to certain persons the exclusive privilege of navigating all the waters within

the jurisdiction of the State with steamboats. The complainant
35 claiming the exclusive right under this act, sought to obtain an injunction to restrain the respondent from navigating the waters within the jurisdiction of the State. The Supreme Court held the act of New York unconstitutional, simply upon the ground that it was in conflict with the act of Congress providing for enrolling and licensing vessels in the coasting trade. The respondent's vessel having been licensed under that act, was entitled, say the court, to navigate any of the navigable waters of the United States, and no State had a right to forbid it, as was done in that case. And the court expressly waive the question of exclusiveness.

On page 200, the Chief Justice says: "In discussing the question whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation."

36 The great judge who delivered the opinion in that case has, we think, repudiated the notion that any such point was determined by the court. The case of Wilson *vs.* The Blackbird Creek Marsh Co. came before the same tribunal, subsequently to the decision of Gibbons *vs.* Ogden, and that case was relied on by the counsel for the plaintiff in error as conclusive to establish the unconstitutionality of the law of Delaware, but the court holds distinctly and emphatically that the mere grant of power to Congress is exclusive only so far as it may be exercised by it, thus utterly ignoring the construction which has so often been placed upon the case of Gibbons *vs.* Ogden.

The only question decided in the case of Brown *vs.* The State of Maryland was that a State law prohibiting an importer of foreign goods from selling without a license was unconstitutional, because repugnant to that article of the Constitution which declares that "no State shall lay any impost or duties on imports or exports; "the court holding that the importation gave a right to the importer to
37 sell such goods free from any charge by the State. It is also said by the court that Congress having authorized the importation by implication, authorized the sale by the importer, and therefore any law of the State prohibiting such sale or taxing the privilege was an interference with the regulation of commerce by the general government.

Nothing further was determined in that case, and it certainly bears no analogy to the one under consideration.

The opinions and reasonings of some of the judges in the passenger cases are unmistakably in conflict with our position. and to many of the former decisions of the same court. But those opinions, so far as they pass upon the question of the exclusiveness of the power of Congress to regulate commerce, did not receive the concurrence of a majority of the justices. Chief Justice Taney, and Judges Daniels, Nelson, and Woodbury dissent from the opinions delivered by

the other judges, and Mr. Justice Catron distinctly says that the question did not arise in those cases, and placed his concur-
38 rence upon the ground that the acts of New York and Massachusetts were repugnant to certain laws of Congress. If he had not changed the opinion which he entertained in the license cases, (and there seems to be no indication that he had,) a majority of the justices were opposed to the reasoning of Judge McLean. Nothing was therefore determined in that case but that the laws of New York and Massachusetts were in conflict with certain laws of Congress regulating commerce, and treaties of the general government, and that they were for those reasons void. If it were admitted, however, that the passenger cases determine the question in favor of the exclusiveness of the power, and the reasoning of Judge McLean is to prevail, those cases are utterly irreconcilable with the theory upon which a large number of cases have been decided by that court, and which are accepted as authority. And it must be admitted that the reasoning of Judge McLean does not sustain the position, and is in direct conflict with his opinions in other cases. In the case of Thurlow *vs.* The Commonwealth of Massachusetts, he says: "A license may be required to sell foreign articles, when those of a do-
39 mestic manufacture are sold without one. And if the foreign articles be injurious to the health or morals of the community, a State may, in the exercise of that great conservative police power which lies at the foundation of its prosperity, prohibit the sale of it."

But how, if the power to regulate commerce be exclusive in Congress, can a State prohibit the importation of any article of commerce? There is surely nothing in the Constitution which authorizes the prohibition or control of one article more than another. Is there anything in the grant of power which authorizes the prohibition of an article which is injurious to the health or morals of the community, any more than that which may be prejudicial to its manufacturing or agricultural interest? Certainly not. The word commerce, as used in the Constitution, includes commerce in all its ramifications, and in every feature or form which it may assume, that is, with foreign countries, and among the States, and if the power to
40 regulate it be exclusive it is co-extensive with the meaning of the word. If Congress alone can exercise that power, the conclusion is easily shown by the simple syllogism:

A State law regulating commerce is unconstitutional and void.

A law prohibiting the importation of licentious publications, infected goods, or providing quarantine regulations, is a regulation of commerce.

Therefore any law affecting those subjects is unconstitutional.

And yet it is admitted by all that a State may prohibit the importation of such articles and may make quarantine regulations. And it seems impossible to maintain it upon any hypothesis, except that the power to regulate commerce is concurrent in Congress and the several States. It would be the propagation of a dangerous heresy to hold that a State may regulate commerce, whenever, in the discretion of its legislature, the health or morals of the community required

it, and that such regulation would be superior to the power of the general government. This would be making the power of
41 Congress to regulate commerce subordinate to the police power of the State, for it gives to the State the power of determining what articles may be imported and what prohibited, and it needs no argument to show that the power which may prescribe what articles may be the subject of commerce is the controlling one. If the State has a right to determine what articles of commerce are or are not injurious to the health or morals of the community, and to prohibit the importation of whatever may be deemed so injurious, it must be admitted that its power over commerce is unlimited and supreme, and if the power is exclusive in Congress, it amounts to a prohibition upon the States, and no necessity such as the preservation of health, morals, or safety of the community, could sustain the State law which in anywise regulated commerce, and the exceptions which are made are unwarrantable.

The better rule and that sustained by the preponderance of authority, seems to be that, subject and subordinate to the power of Congress, a State may regulate commerce within its jurisdiction, and its laws enacted for that purpose are unconstitutional only when they
42 conflict with or are repugnant to some act or regulation of the general government.

This rule removes all possible difficulties, recognizes the supremacy of the power of Congress, and its exclusiveness, so far as it may be exercised, and enables the States to relieve themselves from the evils and inconveniencies which might possibly arise from the failure or neglect of Congress to exercise any power granted to it. In other words, the States are enabled to protect themselves, not from the laws or constitutional authority of Congress, but from its inaction.

Upon the second point made by counsel for petitioner little need be said. We do not think that the passengers upon whom this tax is levied can be included within the provision of the Constitution which declares that no State shall lay any duties or imposts on imports or exports. It seems to be generally admitted that the words import and export have reference to property and not to persons. Brown *vs.* State of Maryland.

Neither does the tax conflict with section 7, article 2, of the
43 State constitution, which limits the poll-tax to four dollars upon all male residents of the State within certain ages. This cannot be considered a poll-tax within the meaning of that section of the constitution. If it be a tax on the passengers at all it is levied upon those enjoying or exercising a certain privilege. But it is more properly a tax upon the common carrier, regulated by the number of passengers transported.

The State law is, therefore, constitutional.

The time having expired during which the petitioner could be held under the commitment of the court below, no order can be made

remanding him to the custody of the sheriff. But our views here expressed may be a guide in subsequent cases of this character.

We concur.

LEWIS, *C. J.*
BROSNAN, *J.*
BEATTY, *J.*

Rendered May 31st, 1865.

44 UNITED STATES OF AMERICA, *State of Nevada, ss:*

I, Alfred Helm, clerk of the supreme court of the State of Nevada, do hereby certify that the foregoing is a true and complete copy of the opinion of the supreme court of the State of Nevada in the case ex parte Crandall, as the same appears by the original on file in my office.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office at Carson City, this 26th day of June, A. D. 1865.

[SEAL.]

ALFRED HELM, *Clerk,*
By GEO. R. HAMMOND, *Deputy.*

Supreme Court of the United States.

IN ERROR FROM THE SUPREME COURT OF THE STATE OF NEVADA.

EX PARTE CRANDALL.

Brief of Counsel for Respondent.

The proceedings in this case have their origin in the refusal of the plaintiff in error to make return of the number of passengers transported out of the State of Nevada, in the month of April, A. D. 1865, by the Pioneer Stage Company, of which he was the agent, in compliance with the requirements of a statute of that State, enacted March 8, 1865.

I.

If some portions of a statute are deemed, or held to be unconstitutional, it does not follow that the entire statute is, therefore, void.

It is not perceived how, or wherein, the requirement of the statute, to make return of the number of passengers transported beyond the State, by the Pioneer Stage Company, conflicts with the Constitution of the United States. For refusing to make such return, the plaintiff in error, after due proceedings had been instituted, was adjudged to be in contempt of the mandate of the Court, and by its order was committed to the custody of the sheriff of Ormsby county.

The question of the payment or non-payment of the tax had not arisen, and does not enter into or form any part of the consideration of the order and judgment of the court. The plaintiff might have made his return, and still refused to pay the tax. If he had been imprisoned for that cause, or the property of the company levied upon by the sheriff, the question of the constitutionality of the tax might be raised. Upon the record, as it now stands, that point does not necessarily arise.

Neither does the fact, that the counsel in the court below argued the question upon the ground of the unconstitutionality of the tax, raise that point in this Court, or change the issue presented in the record.

II.

1. A statute will not be declared unconstitutional by the courts, unless it be *clearly* repugnant to the Constitution. 12 Cal., 384.

People *vs.* Burbank; 12 Wheat., 270, (per Washington, J.,) and a very large number of cases cited in U. S. Digest, vol. 1, page 553, "Constitutional Law."

III.

1. The law in question is not in conflict with that clause of section ten, of article one, of the Constitution of the United States, which provides that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," &c., in that

2. *Persons* carried out of a State are not "exports" within the meaning of this clause.

An export is a "*thing* exported," not a *person*. 12 Wheat., 438, Brown *vs.* State of Maryland, (per Marshall, C. J.;) 11 Pet,, 102, City of New York *vs.* Miln—(see page 136–7;) 5 Howard, 594, License cases, (per McLean, J.)

IV.

Nor is the law in question in conflict with the provisions of that clause of section eight, article one, of United States Constitution, which says that "Congress shall have power * * * to regulate commerce * * * among the several States, &c.; in that

1. This grant of power has never yet been exercised by Congress. Congress has enacted no statute upon the subject of inter-State travel.

2. Said grant of power, while thus dormant and not exercised by Congress, does not deprive the several States of the power to regulate commerce among themselves, which confessedly belonged to them before the adoption of the Constitution of the United States. In all decided cases where analogous laws of the several States have been held unconstitutional, it has been because of their alleged conflict with laws *actually enacted* by Congress under the power given that body by the Constitution "to regulate commerce with foreign nations * * * and with Indian tribes." In such case of course the State law must go to the wall, under section two, of article six, of United States Constitution. 9 Wheat., 1, Gibbon *vs.* Ogden, (per Marshall, C. J., p. 200;) 5 Wheat., 1, Houston *vs.* Moore, (per Washington, J., p. 21;) (per Story, J., p. 49;) 2 Pet., 246, Wilson *vs.* Blackbird Creek Marsh Company, (per Marshall, C. J., p. 252;) 12 Wheat., 419, Brown *vs.* State of Maryland, (per Marshall, C. J., p. 448;) 11 Pet., 102, City of New York *vs.* Miln, (per Barbour, J., delivering opinion of Court, pp. 134, 135, 136, 139, 140, 141;) (per Thompson, J., pp. 145, 146, 151;) 5 Howard, 504, License cases,

(per Taney, C. J., pp. 574, 578, 579, 580, 1, 2, 3, 4, 585, 6;) Ib., 607, (per Catron, J., 607;) Ib., 618, (per Nelson, J., concurring with Taney, C. J., and J.;) Ib., 618, (per Woodbury, J., pp. 618, 619, 624, 5.)

3. So, even if the law in question were intended purely as *pro tanto* a regulation of commerce among the States, it would still not be in violation of the constitutional provision last cited.

V.

But even if it would be in violation of said constitutional grant of power to Congress, to *regulate commerce* among the States, for the State to make regulations of commerce between this and adjacent States, still the law in question is not unconstitutional; because,

1. The law in question is evidently not intended as such commercial regulation, but entirely *as a tax* for the support of the State Government. A law thus passed entirely *diverso intuitu* does not become a regulation of commerce merely because in its operation it may bear indirectly upon commerce. 9 Wheat., 201, 2, 3, 4. (per Marshall, C. J.) Gibbon *vs.* Ogden, City of New York *vs.* Miln, 11 Pet., 86, (per Marshall, C. J., pp. 201, 2, 3, 4.)

2. The power of taxation is (like the police power) indispensable to the existence of a State Government, and has never been claimed to be impaired by any clause of the United States Constitution, except so far and in such respects as that instrument *expressly* prohibits it. To take away that power *by inference* would be to open the way for entire destruction of State Government.

No State tax has ever been held unconstitutional by the Supreme Court of the United States, unless expressly or by necessary implication prohibited by the United States Constitution, or in conflict with a law of the United States "made in pursuance thereof."

9 Wheat., 199, (per Marshall, C. J.;) Ib., 210, 211, (per Marshall, C. J.;) and the cases generally cited *ante;* 4 Wheat., 316, McCullough *vs.* State of Maryland, pp. 427, 8, 436; 11 Pet., 102, City of New York *vs.* Miln, pp. 133, 7, 8, 9.

3. The exercise of this taxing power in the present instance, not being expressly nor by reasonable implication prohibited by the United States Constitution, nor in conflict with a law of the United States "made in pursuance thereof," is thus the exercise of a right universally conceded to have originally belonged to the several States, as a right which the authorities agree has never been surrendered by the States and is not in conflict with any United States law.

not a tax on imports or exports - they v. it as explained
Brown v Maryland,
Ex p Miln 11 Pet 128